



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 31, 1993

Mr. Fred S. Brinkley, Jr., R.Ph.
Executive Director/Secretary
Texas State Board of Pharmacy
8505 Cross Park Drive, Suite 110
Austin, Texas 78754-4594

Letter Opinion No. 93-26

Re: Whether certain revenues that the
State Board of Pharmacy collects are subject
to consolidation under chapter 403 of the
Government Code (RQ-447)

Dear Mr. Brinkley:

You have asked us to determine whether revenues, other than fines, that the State Board of Pharmacy ("the board") collects pursuant to the Texas Pharmacy Act ("the act"), V.T.C.S. article 4542a-1, constitute "funds outside the state treasury" for purposes of sections 403.094 and 403.095 of the Government Code.

The sections of the Government Code about which you inquire provide in pertinent part as follows:

§ 403.094. Consolidation of Funds; Abolition of Dedications

(a) The comptroller, with the concurrence of the treasurer, may abolish any fund or account in existence on or before August 31, 1993. The money in the abolished funds or accounts shall be merged, combined, or segregated into the general revenue fund or other funds as determined by the comptroller under Subsection (e). The comptroller may establish accounts in the general revenue fund or other funds to identify each source of revenue.

....

(j) This section does not apply to:

(1) funds outside the treasury.

§ 403.095. Use of Dedicated Revenue

(b) Notwithstanding any law dedicating or setting aside revenue for a particular purpose or entity, dedicated revenues that, at the end of a biennium, exceed the amount appropriated are available for general governmental purposes. This subsection does not apply to revenues in:

(1) funds outside the treasury.

In the context of chapter 403 of the Government Code, "account" denotes "a subdivision of a fund"; "dedicated revenue" denotes "revenue set aside by law for a particular purpose or entity"; and "fund" denotes "a fiscal and accounting entity with a self-balancing set of accounts recording cash and other financial resources." Gov't Code § 403.001(b)(1), (2), (3). Chapter 403 does not define "funds outside the treasury."

You are particularly interested in knowing how, if at all, sections 403.094 and 403.095 of the Government Code will affect revenues the board collects from sources other than fines. See V.T.C.S. art. 4542a-1, § 17(a)(1), (2) (requiring board to license and renew licenses of qualified applicants and pharmacies); *id.* § 21(a) (requiring applicant for licensing by examination to pay a license fee); *id.* § 22(a)(1) (requiring applicant for licensing by reciprocity to pay reciprocity fee); *id.* § 24(b) (requiring applicant for renewal of license to pay renewal fee); *id.* § 39 (limiting amount of fees for various duties and functions board carries out in connection with licensing and renewing licenses). Regarding the board's non-fine revenues, section 17(g) of the act provides as follows:

Revenue, other than fines, collected under this Act constitutes a *fund outside the state treasury* from which the expenses of administering this Act are paid. Money in the fund may not be expended except pursuant to specific legislative appropriation in the General Appropriations Act. An appropriation is not required for the investment of the fund by the board and for payment of customary fees or charges in connection with the investment. Investment income shall be deposited in the fund. The fines collected under this Act shall be deposited to the credit of the general revenue fund and may not be used for the administration of the Act. The board shall defray all expenses under this Act from fees provided in this Act, and the State of Texas shall never be liable for the compensation or expenses of any member of the board, or its officers or employees, or any other expenses thereof. The board's books and records are subject to audit by the state auditor in accordance with Chapter 321, Government Code.¹ [Emphasis added.]

On its face, section 17(g) of the act describes the board's non-fine revenues as a "fund outside the state treasury." Solely on the basis of the plain language of section 17(g), we believe that the board's non-fine revenues constitute a "fund outside the treasury" for purposes of sections 403.094 and 403.095 of the Government Code.

The legislative history of section 17(g) of the act supports our conclusion. The legislature enacted House Bill 1628, which proposed adding section 17(g), in 1981 in response to a report the Sunset Advisory Commission prepared. See Sunset Advisory

¹Chapter 321 of the Government Code requires the state auditor to audit all state departments, agencies, boards, bureaus, institutions, and commissions. *Id.* § 321.013(a); see *id.* § 321.001(2) (defining "department").

Comm'n, Legislative Proposals, 67th Leg. (Dec. 1980). The Sunset Advisory Commission proposed to require the board to deposit all revenues it generates from fees into the state treasury to the credit of the board's fund, and to require the board to deposit revenues it generates from fines to the credit of the state's general revenue fund. *Id.* at 417, 419. The House Committee Substitute for House Bill 1628 adopted the division of funds that the Sunset Advisory Commission originally had proposed: the House Committee Substitute required the board to deposit into the state treasury "to the credit of a special fund to be known as the State Board of Pharmacy Fund" all money, other than fines, that the board receives, while the substitute required the board to deposit into the state treasury "to the credit of the General Revenue Fund" all money that the board receives from fines. H.C.S.H.B. 1628, 67th Leg., § 17(g), Bill File.

The House of Representatives amended the language of section 17(g) on the floor of the House to provide that "[r]evenue, other than fines, collected under this Act constitutes a fund outside the state treasury." In offering the amendment, Representative Von Dohlen explained that by taking revenues the board generates from fees out of the state treasury, the board will receive interest on the fund and can lower the amount of the fees it must charge pharmacists and pharmacies. Debate on H.B. 1628 on the Floor of the House, 67th Leg. (May 14, 1991) (tape available from House Committee Coordinator). Representative Evans, who opposed Von Dohlen's amendment, felt that by removing the board's non-fine revenues from the treasury, the state would lose control of the fund and the board would be unaccountable for any improprieties that might occur in connection with the fund. *Id.*

Representative Von Dohlen's floor amendment, his testimony on the floor of the House, and the testimony of Representative Evans indicate that the legislature intentionally changed the nature of the fund containing the board's non-fine revenues from an account in the state treasury to a fund outside the state treasury. We accordingly conclude that, for purposes of sections 403.094 and 403.095 of the Government Code, the board's non-fine revenues constitute funds outside the treasury. Thus, revenues the board generates from sources other than fines are not subject to sections 403.094 and 403.095 of the Government Code.

S U M M A R Y

For purposes of chapter 403 of the Government Code, revenues the State Board of Pharmacy generates from sources other than fines are deposited into a fund outside the state treasury. Sections 403.094 and 403.095 of the Government Code therefore do not apply to the State Board of Pharmacy's fund.

Yours very truly,


Kimberly K. Oltrogge
Assistant Attorney General
Opinion Committee